IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

SEP 9
MICHAEL RODAK, JR.

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; AND PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY; LOUIS J. FORTUNA, CHIEF OF POLICE OF CITY OF SAN BERNARDINO; LOWELL E. LATHROP, DISTRICT ATTORNEY OF SAN BERNARDINO COUNTY; JAMES LAMBERT; C. H. BARRETT; AL C. BALLARD, MAYOR OF CITY OF SAN BERNARDINO; AND HOMART DEVELOPMENT COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION ON BEHALF OF HOMART DEVELOPMENT CO., JAMES LAMBERT AND C. H. BARRETT

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Respondents Homart Development Co., James Lambert and C. H. Barrett oppose the issuance of a writ of certiorari to review the decision and judgment of the Supreme Court of California which issued in this case on April 25, 1974 (Pet. App. O, pp. A99-A124).

QUESTIONS PRESENTED FOR REVIEW

Whether, notwithstanding *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), the owner of a shopping center may be compelled, in derogation of its Fifth Amendment property rights, to have its private commercial property confiscated for the use of those who wish to engage in petition circulation thereon notwithstanding that (1) the activities are unrelated to any business of the center and (2) there are effective alternative locations in which to engage in such activities.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case is adequate with two exceptions. *First,* contrary to Petitioners' assumption (Pet., p. 4), petition circulation is not, and has never been, permitted on Homart's private shopping center property (See Pet. App. C., pp. A18-A19; Pet. App. E, pp. A28-A29; Pet. App. G, p. A51; Pet. App. O, p. 101). *Second,* Petitioners erroneously assert (Pet., pp. 18-19) that no evidence was presented to demonstrate that there were effective alternative means and locations to conduct their activities; ample such evidence was presented to and repeatedly accepted by and the California Supreme Court, Appellate Court and Supreme Court (See Pet. App. C., P. A19; Pet. App. E., pp. A30-A31; Pet. App. G., pp. A59-A60; Pet. App. J., p. A72; Pet. App. K, pp. A77-78; Pet. App. O, p. A104-A105).

REASONS FOR DENYING THE WRIT

1. Petitioners' principal contention is that, by virtue of California law, an exception should be created for one means of expression, initiative petition solicitation, that does not exist for other comparable activities, e.g., handbilling, as a result of *Lloyd*. This same argument, however, was made to and rejected

by the ultimate arbitrator of California law—the California Supreme Court. That court's construction of state law is, of course, binding on this Court (*Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 (1928)) and does not raise a question worthy of review.

2. Petitioners further contend that *Lloyd* did not resolve the issue presented by this case. This contention is erroneous. The instant case falls squarely within the ambit of *Lloyd:* the desired activity is unrelated to the Homart center's operations; there were effective alternative sites for such conduct; the center's invitation to the public is limited to the conduct of its business; and there has been no assumption whatsoever of any municipal function or power by Homart. Moreover, this Court has previously declined to grant certiorari in this very case. Not only was the initial petition denied (402 U. S. 936 (1971)), but, subsequently, three separate petitions for rehearing also were denied (404 U. S. 874 (1971); 405 U. S. 981 (1972); and 409 U. S. 897 (1972)). Even though the most recent petition for rehearing arose in the post-*Lloyd* period, this Court again chose not to grant certiorari.

Petitioners mistakenly rely upon a pre-*Lloyd* case, *Sutherland* v. *Southcenter Shopping Center, Inc.*, 3 Wash. App. 633, 478 P. 2d 792 (Ct. App. 1970), and disregard the post-*Lloyd* cases, *Homart Development Company* v. *Fein*, 293 A. 2d 493 (R. I. Sup. Ct., 1972), and *Lenrich Associates* v. *Heyda*, 504 P. 2d 112 (Ore. Sup. Ct. 1972), which directly undercut their position. This Court's 1972 decision in *Lloyd*, it is submitted, needs no clarification. Petitioners, in assuming that subsequent decisions of this Court have vitiated *Lloyd*, place improper reliance upon *Police Department* v. *Mosley*, 408 U. S. 92 (1972), *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), and *Steffel* v. *Thompson*, ..., U. S. ....., 39 L. Ed. 2d 505 (1974), notwithstanding that the first two cases involved *picketing* on *public property* and the latter decision did not reach the merits of the substantive issue of the propriety of the conduct there involved.

3. Finally, Petitioners contend that the California Supreme Court failed to consider various factual distinctions between the instant case and *Lloyd*. The court below, however, considered such asserted differences at length (Pet. App. O, pp. A101-A102, A104-A105) and, in any event, this Court does not "grant a certiorari to review evidence and discuss specific facts". *United States* v. *Johnson* 268 U. S. 220, 227 (1925).

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied

Respectfully submitted,

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